IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES CHRISTY	:	CIVIL ACTION
	:	
vs.	:	NO. 93-3346
	:	
PENNSYLVANIA TURNPIKE COMMISSION, ROBERT BRADY, JOHN BOSCHI, VINCENT GRECO and JOHN STEWART	:	

MEMORANDUM AND ORDER

JOYNER, J. March , 1994

By way of the motions presently before the Court, the defendants in this civil action seek the entry of summary judgment in their favor on all counts of the plaintiff's complaint against them. For the reasons set forth in the following paragraphs, the motions are denied.

I. STATEMENT OF RELEVANT FACTS

On June 22, 1993, the plaintiff, Charles Christy, commenced this case against the Pennsylvania Turnpike Commission and its individual commissioners and personnel committee members pursuant to 42 U.S.C. §§1983 and 1985 and for the common law tort of intentional infliction of

emotional distress for the defendants' alleged failure/refusal to give him a promotion solely on political grounds.[1]

According to the pleadings, the plaintiff has been employed by the Turnpike Commission since 1976 in various positions and has been employed since 1983 as an Auto Mechanic 1. On November 4, 1992, the Commission posted a job vacancy notice for the position of Paint Crew Foreman. Charles Christy subsequently applied for that position and on January 19, 1993, he was interviewed therefor by the defendants Boschi, Greco and Stewart. Although the pleadings and the record in this matter are silent as to the number of applicants who applied for the paint crew foreman job, it appears that the plaintiff was one of three final candidates found to be qualified by Boschi, Greco and Stewart and whose name was forwarded on to the commission's personnel committee for consideration. According to the plaintiff, regardless of the fact that he was the most qualified person for the job, the paint crew foreman position was awarded to one Sean Pilecki, who had only been employed by the Commission for the preceding 4 and 1/2 years but whose father, George Pilecki, had political ties to various high-ranking officials of the Philadelphia County branch of the Democratic Party. Plaintiff further alleges that he was also turned down for political reasons when he applied for the position of Eastern Division Equipment Supervisor in early 1993.

In response to the plaintiff's allegations of political bias, the defendants first content that they made their hiring decisions on the basis of which candidate was the most and

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1 It should be noted that on February 4, 1994, this court granted plaintiff leave to file an amended complaint, the substance of which essentially operates to clarify the parties and facts underlying his causes of action without significantly altering the character of this action.

best qualified person for the job(s) for which the applications were being made. In addition, Defendants have raised a number of affirmative defenses to the plaintiff's lawsuit, including the defense of immunity from suit.

II. DISCUSSION

A. Legal Principles Applicable to Summary Judgment Motions.

Fed.R.Civ.P. 56(c) prescribes the appropriate principles to be applied by the district courts in determining motions for summary judgment. That rules states, in pertinent part:

> ...The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Under this rule, the courts must look beyond the bare allegations of the pleadings to ascertain if they have sufficient factual support to warrant their consideration at trial. Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287 (D.C.Cir. 1988), cert. denied, 488 U.S. 825, 109 S.Ct. 75, 102 L.Ed.2d 51 (1988). In making this determination, all of the facts must be viewed in the light most favorable to the non-moving party and all reasonable inferences must be drawn in favor of that party as well. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); U.S. v.

Kensington Hospital, 760 F.Supp. 1120, 1126-1127 (E.D.Pa. 1991).

This is not to say, however, that the non-moving party may rest upon the allegations contained in his or her pleading in defense of a summary judgment motion. To the contrary, Fed.R.Civ.P. 56(e) states:

> When a motion for summary judgment is made and supported as provided for in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Thus, while the moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact, the non-movant must then establish the existence of each element of its case. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3rd Cir. 1990), cert. denied, 499 U.S. 921, 111 S.Ct. 1313, 113 L.Ed.2d 247 (1991). In other words, for a plaintiff to avoid summary judgment, there must be sufficient evidence from which a jury could find for the plaintiff. Anderson v. Liberty Lobby, Inc., supra, 477 U.S. at 248, 106 S.Ct. at 2510; Laidley v. McClain, 914 F.2d 1386, 1390 (10th Cir. 1990).

B. Defendants' Entitlement to Immunity from Suit Under the Eleventh Amendment to the U.S. Constitution

At the outset, the defendants allege that they are entitled to the entry of judgment in their favor as a matter of law by virtue of the immunity provisions contained in the Eleventh Amendment to the U.S. Constitution. Specifically, that Amendment reads:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Nevertheless, there are two methods by which a state's eleventh amendment immunity may be overcome. First, Congress may explicitly legislate to abrogate this immunity; and second, the state may voluntarily waive its eleventh amendment immunity. McConnell v. Adams, 829 F.2d 1319, 1328 (4th Cir. 1987). Absent waiver, neither a State nor agencies acting under its control may be subject to suit in federal court. Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., ___U.S.___, 113 S.Ct. 684, 687-688, 121 L.Ed.2d 605 (1993). This principle applies with equal force to bar a civil rights suit in federal court that names the state or a state department or agency having no existence apart from the state as a defendant. See: Laskaris v. Thornburgh, 661 F.2d 23, 25 (3rd Cir. 1981), cert. denied, 469 U.S. 886, 105 S.Ct. 260, 83 L.Ed.2d 196 (1984); Jiminez v. Lakelands Racing Association, Inc., 567 F.Supp. 1298, 1301 (W.D.Pa. 1983).

The Supreme Court, however, has held that Congress did not intend by the general language of Section 1983 to override the traditional sovereign immunity of the States and, as the provisions of 42 Pa.C.S.A. §8521 make clear, the Commonwealth of Pennsylvania has not consented to waive its eleventh amendment immunity:

> (a) **General rule.**--Except as otherwise provided in this subchapter, no provision of this title shall constitute a waiver of sovereign immunity for the purpose of 1 Pa.C.S.§2310 (relating to sovereign immunity reaffirmed; specific waiver) or otherwise.
>
> (b) **Federal courts.**-- Nothing contained in this subchapter shall be construed to waive the immunity of the Commonwealth from suit in Federal courts guaranteed by the Eleventh Amendment to the Constitution of the United States.

Quern v. Jordan, 440 U.S. 332, 342, 99 S.Ct. 1139, 1145, 59 L.Ed.2d 358 (1979).

In those cases where the bar of the eleventh amendment is raised and there has been no waiver of the immunity arising thereunder, it thus becomes incumbent upon the Court to ascertain whether or not the agency raising the defense has a sufficiently close nexus with the state to render it immune from suit as well. Whether or not an agency or instrumentality is the alter ego of the state and, therefore, immune from suit by virtue of the eleventh amendment is a question of federal, not state law and turns upon facts widely varient from case to case. Smith v. New Jersey Transit Corp., 691 F.Supp. 888, 889 (E.D.Pa. 1988); Harris v. Pennsylvania Turnpike Commission, 410 F.2d 1332, 1337 (3rd Cir. 1969), cert. denied, 396 U.S. 1005, 90 S.Ct. 558, 24 L.Ed.2d 497 (1970). However, state decisions concerning the relationship of an agency to the state may be an important, and under certain circumstances, a controlling factor in the determination of immunity. Blake v. Kline, 612 F.2d 718, 722 (3rd Cir. 1979), cert. denied, 447 U.S. 921, 100 S.Ct. 3011, 65 L.Ed.2d 1112 (1980).

In this regard, several courts have reasoned that the state is the real party in interest when the action seeks an award of money that will come from the state treasury. Savage v. Commonwealth of Pennsylvania, 475 F.Supp. 524, 531 (E.D.Pa. 1979), aff'd, 620 F.2d 289 (3rd Cir. 1980), citing, inter alia, Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464, 65 S.Ct. 347, 89 L.Ed. 389 (1945); DiPietro v. The Garden State Racing Association, 463 F.Supp. 574, 576 (E.D.Pa. 1978). Other factors worthy of consideration include: (1) whether the agency is performing a governmental or propriety function; (2) how local law defines the status and nature of the agency; (3) the degree of autonomy exercised by the agency over its own operations; (4) whether the agency's property is immune from state taxation; (5) whether the agency has been separately incorporated; (6) whether the agency has the power to sue and be sued and enter into contracts; and (7) whether the sovereign has immunized itself from responsibility for the agency's operations. Smith v. New Jersey Transit Corp., supra; Blake v. Kline, supra; Urbano v. Board of Managers of New Jersey State Prison, 415 F.2d 247, 250-251 (3rd Cir. 1969), cert. denied, 397 U.S. 948, 90 S.Ct. 967, 25 L.Ed.2d 129 (1970). See Also: Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 401, 99 S.Ct. 1171, 1177-1178, 59 L.Ed.2d 401 (1979); Port Authority Police Benevolent Association v. Port Authority of New York and New Jersey, 819 F.2d 413, 414 (3rd Cir. 1987), cert. denied, 484 U.S. 953, 108 S.Ct. 344, 98 L.Ed.2d 370 (1987). In close cases, evidence beyond the mere statutory language is required to determine the issue. Smith v. New Jersey Transit Corp., supra, at 889; Blake v. Kline, 612 F.2d at 726.

Regrettably, the issue of whether or not the Pennsylvania Turnpike Commission is an arm or alter ego of the Commonwealth of Pennsylvania is far from clear. It is noteworthy that of those state courts which have considered the

question in recent years and found the commission to in fact be a "Commonwealth Party" have found it be such a party within the meaning of Pennsylvania's sovereign immunity statute, 42 Pa.C.S.A. §8522. See: Smith v. Mognet, 152 Pa.Cmwlth. 302, 618 A.2d 1215 (1992); Pennsylvania Turnpike Commission v. Jellig, 128 Pa.Cmwlth. 171, 563 A.2d 202 (1989), alloc. denied, 525 Pa. 606, 575 A.2d 571 (1990) and Bradley v. Pennsylvania Turnpike Commission, 121 Pa.Cmwlth. 51, 550 A.2d 261 (1988). See Also: Toombs v. Manning, 835 F.2d 453 (3rd Cir. 1987). There have, however, been several U.S. District Court opinions addressing the precise issue with which we are here presented and the Pennsylvania Supreme Court did address the question of whether or not the Turnpike Commission is cloaked with eleventh amendment immunity in Specter v. Commonwealth of Pennsylvania, 462 Pa. 474, 341 A.2d 481 (1975). Although those decisions pre-dated the 1974 and 1985 amendments to the Turnpike Organization, Extension and Toll Road Conversion Act, 36 P.S. §651.1, et. seq. and the Specter decision was issued by a plurality of the Court, careful analysis of the present Act's language suggests to this Court that those courts were correct in concluding that the Pennsylvania Turnpike Commission is not the alter ego of the Commonwealth of Pennsylvania as a matter of federal law and is not entitled to wear the cloak of eleventh amendment immunity from suits such as the one at bar. See, e.g.: Litton RCS, Inc. v. Pennsylvania Turnpike Commission, 376 F.Supp. 579 (E.D.Pa. 1974), aff'd, 511 F.2d 1394 (3rd Cir. 1975); Sherman v. Ulmer, 201 F.Supp. 660 (E.D.Pa. 1961); Linger v. Pennsylvania Turnpike Commission, 158 F.Supp. 900 (D.Pa. 1958). See Also: Sarteschi v. Burlein, 508 F.2d 110 (3rd Cir. 1975); Pennsylvania Turnpike Commission v. County of Fulton, 195 Pa.Super. 517, 171 A.2d 882 (1961).

The Pennsylvania Turnpike Commission was created and exists pursuant to 36 P.S. §652d. Although the language

of that statute does not address all of the above-referenced criteria, it does state that "the commission is...constituted an instrumentality of the Commonwealth and the exercise by the commission of the powers conferred by this act in the construction, operation and maintenance of the turnpike shall be deemed and held to be an essential governmental function of the Commonwealth." In addition, "the commission ... consist[s] of five members..., [and] the Secretary of Transportation shall be a member ex officio [but] may authorize the Deputy Secretary of Highway Administration to act in his place, including the power to vote on any issue. The four remaining members shall be appointed by the Governor by and with the advice and consent of two-thirds of the members of the Senate..."

Section 652d goes on to state that "The commission shall make necessary rules and regulations for its own government and shall have the power to acquire, own, use, hire, lease, operate and dispose of personal property, real property and interests in real property, and to make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this act...All such compensation and salaries and all expenses incurred in carrying out the provisions of this act shall be paid solely from funds provided under the authority of this act, and no liability or obligation shall be incurred hereunder beyond the extent to which money shall have been provided under the authority of this act..."

The commission's powers and duties are reiterated at 36 P.S. §651.7(a); the gubernatorial appointment process for commission members is repeated at 36 P.S. §651.5. Finally §651.6 reaffirms that the exercise by the turnpike commission of the powers granted to it under the act constitute "an essential

governmental function of the Commonwealth." In addition, §651.7 further provides that the commission is authorized to:

> (1) Maintain a principal office at such place as shall be designated by the commission.
>
> (2) Contract and be contracted within its own name.
>
> (3) Sue and be sued, in its own name, plead and be impleaded. Any and all actions at law or in equity against the commission shall be brought only in the courts in which such actions may be brought against the Commonwealth.
>
> (4) Have an official seal.
>
> (5) Make necessary rules and regulations for its own government.
>
> (6) Acquire, hold, accept, own, use, hire, exchange, operate and dispose of personal property, real property and interests in real property, and to make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this act, and to employ engineering, traffic, architectural and construction experts and inspectors, attorneys and other employees as may in its judgment be necessary and fix their compensation.
>
> (7) Provide grade separations, at its own expense, with respect to all public roads, State highways and interstate highways intersected by the turnpikes and to change and adjust the lines and grades thereof so as to accommodate the same to the design for such grade separation. The damages incurred in changing and

> adjusting the lines and grades of public roads, State highways and interstate highways shall be ascertained and paid by the commission....If the commission shall find it necessary to provide a grade separation or change the site of any portion of any interstate highway, State highway or public road or vacate the same, it shall cause to be reconstructed and restored forthwith, at the commission's own expense...
>
> (8) Petition the court of common pleas of the county wherein is situate any public road, or part thereof affected by the location therein of the turnpikes, for the evacuation, relocation, or supply or the same or any part thereof...

What's more, under 36 P.S. §651.15, "...the commission shall not be required to pay any taxes or assessments on any property acquired or used by it for the purposes provided in this act, and the bonds, notes or other obligations issued by the commission, their transfer and the income therefrom, including any profits made on the sale thereof, shall at all times be free from taxation within the Commonwealth." Finally, as is reflected by 36 P.S. §§651.2, 651.4, 651.12, 651.13, and 651.16, the turnpike commission and all of its authorized activities are to be funded and paid for from the tolls and revenues which the commission raises from the issuance and sale of bonds and notes and, as §651.4 makes clear, the obligations, debts, etc. of the turnpike commission are <u>not</u> to be deemed a debt of or a pledge of the faith and credit of the Commonwealth of Pennsylvania. Thus, while the Pennsylvania legislature deems the commission an instrumentality of the Commonwealth and considers the activities of the commission to be essential governmental functions and the Governor is responsible for appointing the members of the Commission, it is nevertheless clear that in all other respects the turnpike

commission functions independently of state interference. Accordingly, and inasmuch as the present language of the Turnpike Commission Act is substantially identical to the language of the Act analyzed by the Pennsylvania Supreme Court in Specter, we see no reason to now depart from its rationale. We therefore conclude that the Pennsylvania Turnpike Commission is not, as a matter of federal law, a part of the Commonwealth of Pennsylvania and that it is not immune from this lawsuit under the Eleventh Amendment.

C. The Individual Defendants' Immunity From Suit Under the Doctrine of Qualified Immunity

The individual defendants, Brady, Boschi, Greco and Stewart next assert that they are entitled to the entry of judgment in their favor as a matter of law inasmuch as they are qualifiedly immune from suit.

It is axiomatic that qualified or "good faith" immunity is an affirmative defense that must be pleaded by a defendant official. Harlow v. Fitzgerald, 457 U.S. 800, 815, 102 S.Ct. 2727, 2736, 73 L.Ed.2d 396 (1982) citing Gomez v. Toledo, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980). The general rule of qualified immunity is intended to provide government officials with the ability to reasonably anticipate when their conduct may give rise to liability for damages and, where applicable, officials can now that they will not be held personally liable as long as their actions are reasonable in light of current American law. Anderson v. Creighton, 483 U.S. 635, 646, 107 S.Ct. 3034, 3042, 97 L.Ed.2d 523 (1987). Qualified immunity may thus be properly invoked to protect governmental officials performing discretionary functions to the extent that their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow, 457 U.S. at 818, 102 S.Ct. at

2738; Winn v. Lynn, 941 F.2d 236, 239 (3rd Cir. 1991). See Also: Mitchell v. Forsyth, 472 U.S. 511, 530, 105 S.Ct. 2806, 2817, 86 L.Ed.2d 411 (1985). Clearly established rights are those with contours sufficiently clear that a reasonable official would understand that what he is doing violates those rights. Hence, while a plaintiff need not show that the very action in question has previously been held unlawful, he need to show that in light of preexisting law, the unlawfulness was apparent. Shea v. Smith, 966 F.2d 127, 130 (3rd Cir. 1992) citing Anderson v. Creighton, supra, 107 S.Ct. at 3039.

For purposes of determining whether a right is clearly established, the court must look to the status of the law at the time of the challenged actions. Burns v. County of Cambria, 971 F.2d 1015, 1024 (3rd Cir. 1992), cert. denied, ___U.S.___, 113 S.Ct. 1049, 122 L.Ed.2d 357 (1993). Naturally, a necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is "clearly established" at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all. Siegert v. Gilley, 500 U.S. 226, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991); D.R. by L.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364, 1368 (3rd Cir. 1992), cert. denied, ___U.S.___, 113 S.Ct. 1045, 122 L.Ed.2d 354 (1993).

Here, the essential thrust of the plaintiff's case is that his first amendment rights to free speech and free association were violated by the defendants by their failure to promote him for purportedly unlawful partisan political reasons. It is therefore fairly obvious that Mr. Christy is indeed asserting the violation of a constitutional right.

Moreover, and as discussed below, it has long been established that conditioning hiring decisions on political belief

and association plainly constitutes an unconstitutional condition unless it can be shown that party affiliation is an acceptable criterion for some type of government employment or that an employee's private political beliefs would interfere with the discharge of his public duties. In that event, an employee's First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency. Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 1294, 63 L.Ed.2d 574 (1980); Elrod v. Burns, 427 U.S. 347, 362-363, 96 S.Ct. 2673, 2684, 49 L.Ed.2d 547 (1976). In 1990, in deciding Rutan v. Republican Party of Illinois, 497 U.S. 62, 110 S.Ct. 2729, 2739, 111 L.Ed.2d 52 (1990), the U.S. Supreme Court extended this rationale to apply with equal force to promotional decisions thereby prohibiting partisan or political considerations from having any influence in the promotional process. Again, it is clear that this was the prevailing state of the law in 1992 and 1993 when the employment decisions at issue in this case were made.

Furthermore, it is evident from the Turnpike Commission's Policy Letter (attached as Exhibit 21 to the plaintiff's response to the instant motions) and from the deposition testimony of John Boschi (at page 25), Vincent Greco (at pages 25-26) and John Stewart (at pages 37-41), that the defendants, like all others involved in the promotion process, had been specifically apprised of the Supreme Court's holding in Rutan. Inasmuch as our review of the record in this case reveals and Messrs. Boschi, Greco and Stewart admit that they were responsible for interviewing, assessing and "grading" candidates for the position(s) for which Mr. Christy applied, and that Mr. Brady, together with this fellow commission members, voted to approve the appointment of Sean Pilecki, it is clear that defendants were all involved in the promotions process in this case. Accordingly, viewing all of the evidence in this matter in light of the foregoing precedent an din the

manner most favorable to the plaintiff, we are unable to find as a matter of law that these defendants did not violate Mr. Christy's clearly established rights or that they are entitled to the cloak of qualified immunity from this suit. The motions for summary judgment on the basis of qualified immunity from suit must therefore be denied.

D. Sufficiency of the Evidence of Record to Demonstrate a Violation of Plaintiff's First Amendment Rights

Defendants next assert that the plaintiff simply cannot prove that his First Amendment rights were violated so as to entitle him to the recovery of monetary damages under 42 U.S.C. §1983. Again, we disagree.

It is well-settled that the freedom to associate with others for the common advancement of political beliefs and ideas is a form of orderly group activity protected by the First and Fourteenth Amendments and that conditioning hiring, firing and promotional decisions on political belief and association plainly constitute an unconstitutional infringement of this right which is actionable under the federal civil rights acts. Rutan v. Republic Party of Illinois, 497 U.S. 62, 110 S.Ct. 2729, 2738-2739, 111 L.Ed.2d 52 (1990); Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 2681, 49 L.Ed.2d 547 (1976).

These individual rights, however, are not absolute and restraints will therefore be permitted for appropriate reasons. Id., 96 S.Ct. at 2683. Thus, if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency. Branti v. Finkel, 445 U.S. 507, 517, 100 S.Ct. 1287, 1294, 63 L.Ed.2d 574 (1980), citing Elrod, 427 U.S. at

366, 96 S.Ct., at 2686. In this regard, the courts have held that "a nonpolicymaking, nonconfidential government employee" cannot be discharged on the sole ground of his or her political beliefs but that an employee who "acts as an advisor or formulates plans for the implementation of broad goals" may be discharged upon a proper showing. Zold v. Township of Mantua, 935 F.2d 633, 635 (3rd Cir. 1991) citing Elrod, 427 U.S. at 367-368, 375, 96 S.Ct. at 2686-2687, 2690; Brown v. Trench, 787 F.2d 167, 168 (3rd Cir. 1986).

Of course, it is not always easy to determine whether political affiliation is a legitimate factor to be considered for a particular job and each decision is naturally fact specific for that case. Zold, at 635, citing, inter alia, Ness v. Marshall, 660 F.2d 517, 522 (3rd Cir. 1981). Although it has been held that in constitutional terms, freedom of association is not to be defined unreservedly and hence entry into the constitutional orbit requires more than a mere relationship, protected political beliefs and associations are not confined to partisan beliefs and associations. Boger v. Wayne County, 950 F.2d 316, 323 (6th Cir. 1991); Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 57 (1st Cir. 1990). Indeed, "political affiliation" has been held to apply to political differences of any kind, not merely differences in party membership. Boger, at 323. Regardless of the type of association involved, however, all employees who claim that adverse employment action was taken against them based upon the exercise of their associational rights must show that they were engaged in constitutionally protected conduct and that that conduct was a substantial or motivating factor in the government employer's decision. Rode v. Dellarciprete, 845 F.2d 1195, 1204 (3rd Cir. 1988); Asko v. Bartle, 762 F.Supp. 1229, 1231 (E.D.Pa. 1991), both citing Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977).

Viewing the record in the instant case in light of the above-referenced principles, we observe at the outset that at the time Charles Christy applied for the paint crew foreman position, he had been employed by the Pennsylvania Turnpike Commission for sixteen and one-half years in various positions. At that time and apparently at the present time, Mr. Christy was and is employed as an auto mechanic at the Commission's Devault facility. There is no evidence whatsoever on this record, however, which would suggest that Mr. Christy is presently a confidential, policymaking employee or that the paint crew foreman position was such as would necessitate political loyalty or affiliation to be performed in an effective manner. Consequently, we can reach no other conclusion but that the Turnpike Commission has no overriding interest such as would justify the encroachment of Mr. Christy's First Amendment right to free association.

We next evaluate whether the record evidence demonstrates that Plaintiff was engaged in constitutionally protected conduct and whether that conduct was a substantial or motivating factor in the Commission's decision to promote another candidate. Again viewing the record in the light most favorable to the plaintiff, the testimony and affidavits of Mr. Christy himself, the affidavit and deposition of James Sperduti and the deposition testimony of John Boschi reflect that while the plaintiff had been active in Democratic party politics in Chester County, the only way he could get a promotion with the Commission was by aligning himself with defendant Robert Brady and Philadelphia County Democratic State Senator Vincent Fumo and pressuring those individuals to promote or create a higher, better paying position for him. This evidence is sufficient indicia that Mr. Christy was engaged in exercising his first amendment right to not associate or align himself with Mr. Brady and/or Senator Fumo and that his decision to not so associate or align himself with those individuals was a

substantial or motivating factor in the Commission's decision to instead promote Sean Pilecki who, along with his father, was apparently so aligned. Inasmuch as we see no difference between refusing to promote someone on the basis of who he associates with and refusing to promote someone on the basis of who he chooses not to associate with, it is the opinion of this Court that there is enough evidence in this record of a violation of Plaintiff's constitutional rights to enable this case to go to a jury.

In so holding, we further find from the affidavits and deposition testimony of defendants Brady, Boschi, Greco and Stewart and both Louis and James Sperduti that adequate evidence exists that each of the individual defendants were influentially involved in the interviewing and evaluation processes and in the making of the final employment decision being challenged in this case. To be sure, as Boschi, Stewart and Greco themselves testified, they were responsible for interviewing and evaluating the candidates. In this case, it appears that the questions asked during the interviewing process and the evaluating criteria may not have been the same for all of the candidates and that the interview evaluation forms may have been somewhat skewed as a result. (See, e.g.: excerpts from Depositions of Charles Christy, John Boschi, Louis Sperduti, James Sperduti and Sean Pilecki.)

For all of the reasons enumerated above, the defendants' motions for summary judgment are denied in accordance with the attached order.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES CHRISTY	:	CIVIL ACTION
	:	
vs.	:	NO. 93-3346
	:	
PENNSYLVANIA TURNPIKE COMMISSION, ROBERT BRADY, JOHN BOSCHI, VINCENT GRECO and JOHN STEWART	:	

ORDER

AND NOW, this day of , 1994 upon consideration of the Defendants' Motions for Summary Judgment, it is hereby ORDERED that the Motions are DENIED for the reasons set forth in the preceding Memorandum Opinion.

BY THE COURT:

_____

J. CURTIS JOYNER, J.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 94-1386 and 94-1398

CHARLES A. CHRISTY,

vs.

PENNSYLVANIA TURNPIKE COMMISSION, A DULY ORGANIZED AND EXISTING AGENCY OF THE COMMONWEALTH OF PENNSYLVANIA; ROBERT BRADY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JAMES J. DODARO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; HOWARD YERUSALIM, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; FRANK S. URSOMARSO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JAMES F. MALONE, III, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JOHN L. SOKOL, JR., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; S. MICHAEL PALERMO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JOSEPH L. DIRIENZO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; SAMUEL S. CARNABUCI, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; MELVIN M. SHELTON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; DEBORAH KOVAL, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY; JOHN A. BOSCHI, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; VINCENT J. GRECO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JOHN A. STEWART, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; GEORGE PILECKI, INDIVIDUALLY AND IN

HIS OFFICIAL CAPACITY; SEAN PILECKI, INDIVIDUALLY

Pennsylvania Turnpike Commission, Robert Brady, Vincent Greco and John Stewart

Appellants No. 94-1386

John A. Boschi

Appellant No. 94-1398

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 93-cv-03346)
Nos. 94-1386 & 94-1398

Present: STAPLETON, ALITO, and LEWIS, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel September 12, 1994. An Opinion and Order of this Court were entered March 27, 1995. A petition for rehearing in banc was filed April 10, 1995. By order entered April 27, 1995, the Court granted panel rehearing, vacated the original Opinion and Judgment, and dismissed the petition for rehearing in banc as moot, without prejudice to the filing of a new application for rehearing in banc, pending issuance of another Judgment disposing of the within appeals. The cause was submitted pursuant to LAR 34.1(a) on April 28, 1995.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered March 10, 1994, be, and the same is hereby affirmed. Costs taxed against appellants. All of the above in accordance with the opinion of this Court.

ATTEST:

Clerk

Dated: May 23, 1995

Filed May 23, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 94-1386 and 94-1398

CHARLES A. CHRISTY,

v.

PENNSYLVANIA TURNPIKE COMMISSION, A DULY ORGANIZED AND EXISTING AGENCY OF THE COMMONWEALTH OF PENNSYLVANIA; ROBERT BRADY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JAMES J. DODARO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; HOWARD YERUSALIM, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; FRANK S. URSOMARSO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JAMES F. MALONE, III, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JOHN L. SOKOL, JR., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; S. MICHAEL PALERMO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JOSEPH L. DIRIENZO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; SAMUEL S. CARNABUCI, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; MELVIN M. SHELTON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; DEBORAH KOVAL, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY; JOHN A. BOSCHI, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; VINCENT J. GRECO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JOHN A. STEWART, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; GEORGE PILECKI, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; SEAN PILECKI, INDIVIDUALLY

Pennsylvania Turnpike Commission, Robert Brady, Vincent Greco and John Stewart,

Appellants No. 94-1386

John A. Boschi,

Appellant No. 94-1398

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 93-cv-03346)

ARGUED SEPTEMBER 12, 1994

OPINION VACATED APRIL 27, 1995

SUBMITTED PURSUANT TO LAR 34.1(a)
ON PANEL REHEARING APRIL 28, 1995

BEFORE: STAPLETON, ALITO and LEWIS,
Circuit Judges.

(Filed May 23, 1995)

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OPINION OF THE COURT

LEWIS, *Circuit Judge.*

In this case, we must determine whether the Pennsylvania Turnpike Commission ("Commission") is an "arm" or "alter ego" of the Commonwealth of Pennsylvania and thus entitled to Eleventh Amendment immunity from suit in federal court. Because we conclude that the Commission is not an arm or alter ego of Pennsylvania we will affirm the district court's finding that the Commission does not enjoy Eleventh Amendment sovereign immunity.

I.

The appellee, Charles Christy ("Christy"), has been an employee of the Commission since 1976.[1] In November of 1992, Christy made application for the position of Paint Crew Foreman. He was interviewed for this position in early 1993 by the appellants John Boschi, Vincent Greco and John Stewart.[2] Christy was then chosen as one of three final candidates for the Paint Crew Foreman position. The names of the three final candidates were passed to the Commission's personnel committee for final review. The personnel committee then recommended that the position

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1. Since 1983, Christy has been employed as an Auto Mechanic 1.

2. John Boschi is currently the Commission's Deputy Executive Director of Maintenance; Vincent Greco is Eastern Division Superintendent of the Commission; and John Stewart is Assistant Deputy Executive Director of Maintenance for the Commission. The other individual defendant in this appeal, Robert Brady, is a Turnpike Commissioner.

be awarded to one Sean Pilecki, a Commission employee during the preceding four and a half years. The Commission adopted the personnel committee's recommendation and hired Mr. Pilecki. Christy subsequently applied and was turned down for the position of Eastern Division Equipment Supervisor.

Christy then sued the Commission and its individual commissioners and personnel committee members pursuant to 42 U.S.C. §§ 1983 and 1985, claiming that he was not promoted due to political bias against him. In response to Christy's claims of political bias, the Commission and individual defendants Brady, Greco and Stewart filed a joint motion for summary judgment, while the defendant Boschi filed a separate summary judgment motion. The district court denied the defendants' motions, ruling as a matter of law that the Commission was not entitled to Eleventh Amendment immunity, and rejecting the individual defendants' claims of qualified immunity. These appeals followed.

II.

The district court had jurisdiction in this case pursuant to 28 U.S.C. §§ 1343(a)(3) and 1367(a).[3] We have appellate

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3. The Commission argues that the district court lacked subject matter jurisdiction over it because Christy had elected to drop the Commission as a party by the time the district court ruled on the Eleventh Amendment issue. Putting aside the question whether or not Christy in fact effectively dropped the Commission as a party, the Commission is incorrect in asserting that the district court lacked subject matter jurisdiction over it at the time the court ruled on the Eleventh Amendment issue. Christy sued the individual defendants in both their individual and official capacities. A suit against an individual in his or her official capacity is no different from a suit against that individual's office. "As such, it is no different from a suit against" the office itself. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989) (citations omitted); *see also Kentucky v. Graham*, 473 U.S. 159 (1985) (emphasizing that official capacity suits "'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" (citation omitted)). In this case, a suit against the individual defendants in their official capacities is the same as a suit

jurisdiction pursuant to 28 U.S.C. § 1291 over the district court's denial of the defendants' motions for summary judgment on Eleventh Amendment and qualified immunity grounds. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, ___ U.S. ___, ___, 113 S. Ct. 684, 687-89 (1993) (Eleventh Amendment immunity); footnote 4, *infra* (qualified immunity). We exercise plenary review of the district court's denial of the defendants' motions for summary judgment. *Rappa v. New Castle County*, 18 F.3d 1043, 1050 (3d Cir. 1994).[4]

III.

We must determine whether the district court correctly concluded that the Commission is not an "arm" of Pennsylvania and therefore not entitled to sovereign immunity under the Eleventh Amendment.[5] The question

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against the Commission. The individual defendants have asserted Eleventh Amendment immunity in relation to Christy's official capacity claims, and pressed that immunity in their summary judgment motions before the district court. Thus, the issue of the Commission's entitlement to sovereign immunity was properly before the district court at the time the court ruled on the issue.

4. The individual defendants argue that the district court erred in denying their motions for summary judgment based on qualified immunity. The plaintiff contends that we lack jurisdiction to entertain this argument because the district court's decision was based on factual rather than legal grounds. We do not agree. We will not address this question at length, however, because it appears likely that the Supreme Court will soon resolve this question in *Johnson v. Jones*, No. 94-455 (Argued April 18, 1995).

While we believe that we have jurisdiction to entertain the individual defendants' qualified immunity argument, we affirm the district court's decision on the merits. When the disputed facts are viewed in the light most favorable to Christy, as they must at summary judgment, we agree that the individual defendants were not entitled to qualified immunity.

5. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . ." U.S. Const. amend. XI. Its explicit terms notwithstanding, the Eleventh Amendment has consistently been interpreted to immunize an unconsenting state " 'from suits brought in federal courts by her own citizens as well as by citizens of another state.' " *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100 (1984) (citation omitted).

whether the Commission is an "arm" of the State is one of federal law. *Blake v. Kline*, 612 F.2d 718, 722 (3d Cir. 1979). However, before undertaking our Eleventh Amendment analysis, we must decide a question of apparent first impression in this Circuit: who bears the burden of production and persuasion with respect to factual questions when a putative state entity claims immunity under the Eleventh Amendment? We conclude that the party asserting Eleventh Amendment immunity (and standing to benefit from its acceptance) bears the burden of proving its applicability. In so concluding, we adopt the reasoning set forth by the Court of Appeals for the Ninth Circuit in *ITSI TV Productions v. Agricultural Associations*, 3 F.3d 1289 (9th Cir. 1993). Because Eleventh Amendment immunity can be expressly waived by a party, or forfeited through non-assertion, it does not implicate federal subject matter jurisdiction in the ordinary sense. *Id.* at 1291. We agree with the Ninth Circuit that "whatever its jurisdictional attributes, [Eleventh Amendment immunity] should be treated as an affirmative defense[,]" and "[l]ike any other such defense, that which is promised by the Eleventh Amendment must be proved by the party that asserts it and would benefit from its acceptance." *Id.* We also agree with the Ninth Circuit that considerations of fairness support this conclusion. As the court noted in *ITSI TV Productions*:

> In general, a claim of Eleventh Amendment immunity will occasion serious dispute only where a relatively complex institutional arrangement makes it unclear whether a given entity ought to be treated as an arm of the state. In such cases, the "true facts" as to the particulars of this arrangement will presumably "lie particularly within the knowledge of" the party claiming immunity.

Id. at 1292 (citations omitted).

Having concluded that the party asserting Eleventh Amendment immunity bears the burden of proving entitlement to it, we turn now to the merits of the immunity question. We have on numerous occasions set forth the criteria to be considered in determining whether an entity is an "alter ego" or "arm" of a state for purposes of the

Eleventh Amendment. *See e.g., Peters v. Delaware River Port Authority*, 16 F.3d 1346, 1350 (3d Cir. 1994); *Bolden v. Southeastern Pennsylvania Transp. Auth.*, 953 F.2d 807, 816-818 (3d Cir. 1991) (*in banc*); *Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655, 659 (3d Cir. 1989) (*in banc*). Our oft-reiterated test entails three distinct inquiries: (1) whether, in the event the plaintiff prevails, the payment of the judgment would come from the state (this includes three considerations: whether the payment will come from the state's treasury, whether the agency has sufficient funds to satisfy the judgment, and whether the sovereign has immunized itself from responsibility for the agency's debts); (2) the status of the agency under state law (this includes four considerations: how state law treats the agency generally, whether the agency is separately incorporated, whether the agency can sue and be sued in its own right, and whether it is immune from state taxation); and (3) what degree of autonomy the agency enjoys. *Peters v. Del. River Port Authority*, 16 F.3d 1346, 1350 (3d Cir. 1994) (*citing Bolden v. Southeastern Pa. Transp. Auth.*, 953 F.2d 807, 816 (3d Cir. 1991) (*in banc*)). We turn now to this three-pronged inquiry.

A. *Funding*

We have explained that although no single factor is dispositive of the Eleventh Amendment inquiry, the "most important" factor is whether a judgment against the entity in question, in this case the Commission, would be paid out of the state treasury. *See, e.g., Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655, 659 (3d Cir. 1989) (*in banc*). The special emphasis we place upon the funding factor is supported by the Eleventh Amendment's central goal: the prevention of federal court judgments that must be paid out of the State's treasury. *See Fitchik*, 873 F.2d at 659-60 (*citing Edelman v. Jordan*, 415 U.S. 651 (1974)). The Supreme Court has recently reiterated the significance accorded this factor in relation to other Eleventh Amendment considerations. In *Hess v. Port Authority Trans-Hudson Corporation*, 115 S. Ct. 394 (1994), the Court explained that "prevention of federal court judgments that must be paid out of a State's treasury"

formed the "impetus" for the Eleventh Amendment. *Hess*, 115 S. Ct. at 404.

> Accordingly, Courts of Appeals have recognized the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determinations . . . . "[T]he vast majority of Circuits have concluded that the state treasury factor is the most important factor to be considered and, in practice, have generally accorded this factor dispositive weight."

Id. (citations omitted).

1. *Whether Payment Will Come from the State's Treasury*

Pursuant to the Turnpike Organization, Extension and Toll Road Conversion Act ("The Act"), 36 P.S. §§ 651.1 *et seq.*, the Commission is authorized to obtain funds through the collection of tolls for the use of the Pennsylvania Turnpike System. 36 P.S. § 651.16. The Commission is also authorized to collect rents and charges for telephone and electric lines, gas stations, garages, stores, hotels, restaurants and advertising signs. *Id.* The Act also authorizes the Commission to obtain funds through the issuance of bonds, notes and other obligations. *Id.* at § 651.12. In addition, the Act authorizes the Commission to obtain funds from the federal government. *Id.* at § 651.19. Finally, the Commission receives some funding out of Pennsylvania's oil company franchise tax collections. 75 Pa.C.S.A. § 9511(h).

The Commission notes that only one of these funding sources — tolls — is not subject to state control. According to the Commission, the state's regulation and control of the Commission's funding is crucial to our analysis of the funding factor. Also significant, according to the Commission, is the fact that upon retiring its debts, or setting aside funds sufficient to do so, the Commission is to be dissolved and all of the Commission's property is to be vested in the Department of Highways. *See* 36 P.S. § 652o.

We do not know what percentage of the Commission's funding might be attributed to each of the funding sources identified above. We are, of course, able to observe that only

one of the five available sources of funding — the oil company franchise tax — is obtained from the state. The other four sources — tolls, rents, bond and note revenues, and federal funding — are not state-derived. That four of the five established sources of the Commission's funding are not state-derived is, we think, even in the absence of additional information, some support for the conclusion that the Commission is not the alter ego of Pennsylvania.[6]

The degree of state regulation of the Commission's funding does not alter our conclusion that the funding factor weighs against according immunity to the Commission. We have explained that state control is only significant to the funding analysis where such control indicates state ownership of the funds. *Fitchik*, 873 F.2d at 661. In other words, state control over an entity's ability to obtain funds is inadequate to demonstrate state ownership of the funds where the state is not shown to have a financial interest that would be directly and adversely affected by the diminution of the funds in question. *See id.* Otherwise, the degree of state control over the entity's funding is relevant to the autonomy inquiry, which we discuss below. *Id.* Here, the state's control over the Commission's *authority to issue* bonds, notes and other obligations falls short of indicating state ownership of the funds obtained *through the issuance* of such bonds, notes and other obligations. Likewise, state control over the Commission's ability to obtain federal funding falls short of indicating state ownership of the federal funds obtained. The Commission's evidence of state control over its ability to obtain funds simply fails to show a financial interest on

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6. Although the figure does not appear in the record, the Commission has represented to us that it has received "more than $112,000,000" in oil company franchise tax revenues. (Commission brief at 36 n.18). We fail to see, however, how we can draw any conclusion from this representation, given that the Commission has failed to provide information regarding the percentage of its annual revenues received in this form. *See Bolden*, 953 F.2d at 819-20 (without knowing what percentage of SEPTA's total revenue comes from state funds under a particular new law, we held that the impact of the law on SEPTA's funding was too uncertain to be given significant weight in the funding analysis).

the part of Pennsylvania that would be directly and adversely affected by the diminution of the Commission's funds obtained through the issuance of bonds or from the federal government.

Nor is our conclusion with respect to the funding factor altered by the fact that the Commission will one day be dissolved and all its remaining funds and property vest in the Department of Highways. Pursuant to 36 P.S. § 652o:

> When all bonds and the interest thereon shall have been paid or a sufficient amount for the payment of all bonds and the interest to maturity thereon, shall have been set aside in trust for the benefit of the bondholders, and shall continue to be held for that purpose, the turnpike and the connecting tunnels and bridges shall become a part of the system of State highways, and shall be maintained by the Department of Highways free of tolls, and thereupon the commission shall be dissolved, and all funds of the commission not required for the payment of the bonds and all machinery, equipment and other property belonging to the commission, shall be vested in the Department of Highways.

36. P.S. § 652o. Thus, the dissolution of the Commission is statutorily contingent upon the Commission satisfying, or being able to satisfy, all of its debts and obligations. If anything, this provision provides further support for our conclusion by illustrating the state's reluctance to take on the Commission's financial obligations as its own.

2. *Whether the Commission Could Satisfy a Judgment Against It*

We do not know how much money the Commission has or would have available to it to satisfy a potential judgment against it. According to the Commission, the lack of record evidence on this point renders this second funding inquiry "irrelevant." We do not agree. Since the Commission bears the burden of proving its entitlement to Eleventh Amendment immunity, the Commission's failure to provide pertinent information regarding its ability, or lack thereof, to satisfy a potential judgment against it simply means that

the Commission has failed to sustain its burden of proof on this important question. Moreover, even in the absence of such evidence, our cases enable us to draw certain conclusions, with respect to the Commission's ability to pay a judgment against it. In both *Bolden* and *Fitchik*, we suggested that an entity with power to raise revenues by raising fares need not request funds from the state to meet shortfalls caused by adverse judgments. *See Bolden*, 953 F.2d at 819; *Fitchik*, 873 F.2d at 661.[7] The Commission is authorized "to fix, and to revise, from time to time," tolls for the use of the Pennsylvania Turnpike System. 36 P.S. § 651.16(a). In fact, the Commission's authority to set the toll rate "shall not be subject to supervision or regulation by any other State commission, board, bureau or agency." *Id.* at § 651.16(b). In light of *Bolden* and *Fitchik*, we think the Commission's power to raise revenue levels by increasing the toll rates, even in the absence of information regarding the Commission's financial condition and consequent ability to pay a judgment against it, supports the view that the Commission need not seek assistance from the state to satisfy a judgment against it.

3. *Whether the Sovereign has Immunized Itself*

The Act provides that "[a]ll compensation and salaries and all expenses incurred in carrying out the provisions of this act shall be paid solely from funds provided under the authority of this act . . . ." 36 P.S. § 651.8(a). Furthermore, the Act provides that all bonds, notes and other obligations issued by the Commission under the Act

> shall not be deemed to be a debt of the Commonwealth or a pledge of the faith and credit of the Commonwealth, but such bonds, notes or other obligations shall be payable solely from the revenues of the commission . . . . All such bonds, notes or other obligations shall contain a statement on their face that the Commonwealth is not obligated to pay the same or

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7. We also noted in *Fitchik*, alternatively, that the entity could cover a shortfall by reducing its expenses or capital budget. *Fitchik*, 873 F.2d at 661. Similarly, the Commission would, we imagine, be able to cover a shortfall by reducing its expenses or capital budget.

> the interest thereon except from revenues of the commission . . . and that the faith and credit of the Commonwealth is not pledged to the payment of the principal or interest of such bonds, notes or other obligations. The issuance of turnpike revenue bonds, notes or other obligations under the provisions of this act shall not directly or indirectly or contingently obligate the Commonwealth to levy or to pledge any form of taxation whatever therefor or to make any appropriation for their payment.

36 P.S. § 651.4.

The Commission observes that the General Assembly of Pennsylvania has not expressly immunized the state from responsibility for *all* of the Commission's possible debts and liabilities. Nowhere in the Commission's original or subsequent enabling acts, the Commission notes, is there a provision disclaiming Pennsylvania's responsibility for the Commission's *unassumed* liabilities and obligations. One can imagine, the Commission suggests, numerous situations in which the Commission would face unassumed liabilities or debts large enough to exhaust the Commission's funds and necessitate the Commission's rescue by the Commonwealth.

In light of our case law, we do not agree that the absence of a blanket disclaimer is significant. What *is* significant under our case law is the fact that the Commission has failed to establish that Pennsylvania is under any affirmative obligation to pay the Commission's unassumed liabilities in the first place. *See Bolden*, 953 F.2d at 819 ("A state legislature might feel compelled as a practical matter to subsidize a variety of entities that provide necessary services, including financially pressed municipalities. Such discretionary subsidies committed in reaction to a judgment, however, would not necessarily transform the recipients into alter egos of the state."). Although the Commonwealth might well *choose* to appropriate money to the Commission to enable it to meet a shortfall caused by an adverse judgment, such voluntary payments by a state

.....ply "'do not trigger [Eleventh Amendment] immunity.'" *Id.* (*quoting Fitchik*, 873 F.2d at 661).[8]

The Commission has failed to establish that (1) a judgment against it would be tantamount to a judgment against the Treasury of the Commonwealth of Pennsylvania; (2) the Commission lacks financial resources sufficient to pay a potential judgment against it; or (3) Pennsylvania would be under any obligation to cover any such potential judgment against the Commission. Accordingly, on the record as it stands before us, the funding factor, the most important of the three, weighs heavily in support of the conclusion that the Commission is *not* an arm of the Commonwealth of Pennsylvania and does not enjoy Eleventh Amendment immunity from suit in federal court.

B. *Status at State Law*

The second general factor we must consider in determining whether the Commission is an arm or alter ego of the Commonwealth of Pennsylvania is the status of the Commission under Pennsylvania law. Our purpose here is to determine whether Pennsylvania law treats the Commission as an independent entity, or as a surrogate for the state. *See Fitchik*, 873 F.2d at 662.

In *Specter v. Commonwealth*, 341 A.2d 481 (1975), a plurality of the Pennsylvania Supreme Court held that the

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8. Christy contends that the Commission is able to self-insure and to purchase liability insurance, and that the Commission in fact self-insures at least part of its contingent liabilities under the Commonwealth's Employee Liability Self-Insurance Program. We have in cases past considered an entity's ability to obtain insurance as evidence of that entity's financial self-sufficiency and independence from the state. *See Bolden*, 953 F.2d at 819; *Fitchik*, 873 F.2d at 661. The Commission counters that the alleged fact of the Commission's self-insurance is not in evidence noting that "[n]o record reference is offered [by Christy], nor does any affidavit, deposition excerpt, or document included in the record support this statement." (Commission reply at 19 n.14). But the Commission overlooks the fact that it bears the burden of proving entitlement to Eleventh Amendment immunity; its failure to provide evidence of an *inability* to obtain insurance is our primary concern, not Christy's failure to cite record evidence to the contrary.

...nmission is not an arm of the Commonwealth and not entitled to sovereign immunity. After examining the legislative acts creating the Commission and defining its purposes and powers, as well as judicial decisions in which the Commission's status was at issue, the court explained that:

> There is, of course, no doubt that the Commonwealth itself could have constructed the Turnpike in the same manner that it constructs and operates its State highways. Had it done so, the State's immunity from suit would encompass actions arising in connection with the Turnpike. But the Commonwealth itself did not build *this* highway and does not maintain it. The legislature created this separate body and at the same time disclaimed any responsibility on the part of the Commonwealth for liabilities which it, the Commission, might incur. It is clear that the Commission is not an integral part of the Commonwealth, and cannot share the attributes of sovereignty which inhere in the state. It follows that the Commission is not immune from suit in tort for the acts of its servants and agents acting in the course of their employment or agency.

Id. at 491 (emphasis in original).

The Commission does, we recognize, possess certain attributes associated with sovereignty. For example, the Commission (1) may exercise the power of eminent domain; *see* 36 P.S. §§ 651.9 – .11; (2) enjoys statutory immunity from suit in state court; *see* 42 Pa.C.S.A. § 8522(a); and (3) is exempt from all state property taxation; *see* 36 P.S. § 651.15. On the other hand, the Commission possesses certain traits not at all characteristic of an arm of the state; for example, the Commission may sue and be sued in its own name; *see* 36 P.S. § 651.7(a)(3); and has the power to enter into contracts in its own name; *see* 36 P.S. § 651.7(a)(2).

On balance, the "status under state law" factors weigh slightly in favor of the conclusion that the Commission is *not* an arm of the Commonwealth of Pennsylvania. This is true, especially in light of the plurality holding of the Pennsylvania Supreme Court in *Specter* that the

Commission is *not* an integral part of the Commonwealth, and thus cannot share the attributes of sovereignty which inhere in the state. *Cf. Peters*, 16 F.3d at 1351 (holding that the Delaware River Port Authority's status under state law weighs in favor of the conclusion that the agency does not enjoy sovereign immunity, especially in light of a Pennsylvania Supreme Court case holding that the DRPA is not "'an integral part of the Commonwealth of Pennsylvania'" (citation omitted)).

The Commission contends that in enacting Pennsylvania's sovereign immunity statute, *see* 42 Pa.C.S.A. §§ 8501 *et seq.*, the Pennsylvania legislature "conclusively repudiated" *Specter*'s conclusion that the Commission is separate and apart from the Commonwealth. The Commission further notes that in two unanimous, post-*Specter*, decisions, the Pennsylvania Commonwealth Court confirmed that the Commission enjoys sovereign immunity. *See Pennsylvania Turnpike Commission v. Jellig*, 563 A.2d 202 (Pa.Cmwlth. 1989); *Bradley v. Pennsylvania Turnpike Commission*, 550 A.2d 261 (Pa.Cmwlth. 1988). To accord *Specter* any deference, the Commission argues, is to give *Specter* value already taken away by the Pennsylvania legislature and judiciary.

We do not share the Commission's appraisal of *Specter*'s continued vitality. Passage of the Pennsylvania sovereign immunity statute has not diminished the significance of *Specter*'s analysis to our assessment of the Commission's claim of entitlement to Eleventh Amendment immunity. By enacting an immunity statute pursuant to which the Commission is accorded sovereign immunity, the Pennsylvania legislature did not "conclusively repudiate" *Specter*'s conclusion that the Commission is not an integral part of the Commonwealth and does not share the attributes of sovereignty inhering in the state. In enacting the sovereign immunity statute, the Pennsylvania legislature merely conferred upon entities such as the Commission by way of statute that which they otherwise lacked, namely, immunity from suit in state court. We implied as much in *Toombs v. Manning*, 835 F.2d 453 (3d Cir. 1987), in which we explained that

> [t]he significance to our analysis of the legislature's inclusion of the . . . Commission as an immune agency is that it is clear that the General Assembly intended to provide sovereign immunity protection not only for those entities which before *Mayle[v. Pennsylvania Department of Highways*, 388 A.2d 709 (1978) (in which the Pennsylvania Supreme Court abrogated sovereign immunity)] had been immune as sovereigns, *but also for those entities not previously immune*, but which now came within the statute's scope.

Toombs, 835 F.2d at 459 (footnote omitted) (emphasis supplied). Nor do *Jellig* and *Bradley* undermine the continuing validity of *Specter's* analysis. In those cases, the Pennsylvania Commonwealth Court merely applied the Pennsylvania sovereign immunity statute to find, unremarkably, that the Commission enjoys sovereign immunity from suit in state court. *See Jellig*, 563 A.2d at 205; *Bradley*, 550 A.2d at 263.[9]

C. *Autonomy*

The Commission's membership is controlled by the executive and legislative branches of the Commonwealth. One member of the five-person Commission must always be the Secretary of Transportation, a cabinet-level position

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9. We recognize that the Pennsylvania sovereign immunity statute itself is some evidence of the Commission's status before the law of Pennsylvania. And as some evidence of the Commission's status at state law, it is relevant to our Eleventh Amendment inquiry. However, it is far from determinative of that inquiry. We have explained that state law extending sovereign immunity to an agency is "relevant to the Eleventh Amendment determination, but it is not dispositive." *Bolden*, 953 F.2d at 815 n.8 (citations omitted).

> Thus, a state law determination of sovereign immunity may coincide with and influence the federal law determination of Eleventh Amendment status, but the former does not conclusively determine the latter . . . . [Otherwise], each state legislature apparently could confer Eleventh Amendment protection on any entity it wished, including counties and cities, by enacting a statute clothing these entities with "sovereign immunity" from suit on state claims.

Id. at 815 n.8, 817.

appointed by the Governor and confirmed by the Pennsylvania Senate. *See* 36 P.S. §§ 651.5(d), 652d; *see also* 71 P.S. § 67.1(d)(1) (Gubernatorial appointment and senatorial confirmation of Secretary of Transportation). The four remaining Commission members are also appointed by the Governor and confirmed by the Senate. *See* 36 P.S. §§ 651.5(b), 652d; *see also* 71 P.S. § 67.1(c)(2) (Gubernatorial appointment and senatorial confirmation of Commission members). State authority over the appointment of Commission members lends obvious support to a finding of sovereignty. *See Peters*, 16 F.3d at 1351-52.

On the other hand, weighing in favor of a finding of autonomy are the facts that the Commission may fix and revise tolls; enter contracts in its own name; issue bonds and notes; sue in its own name; purchase and own property; and promulgate rules and regulations for its own governance. *See* 36 P.S. § 651.16 (fix and revise tolls); 36 P.S. § 651.7 (enter contracts, sue in its own name, purchase and own property, and promulgate rules and regulations for its own governance); 36 P.S. § 651.12 (issue bonds and notes). Of course, several of these powers are subject to a degree of state control. For example, the Pennsylvania Attorney General must review the form and legality of each contract and rule or regulation the Commission proposes. *See* 71 P.S. § 732-204(b) (review of rules and regulations); 71 P.S. § 732-204(f) (review of contracts). Moreover, Commission issuance of bonds and notes is subject to state approval. *See* 36 P.S. § 652u.1

On balance, the significant control the Commonwealth exercises through the power to appoint all the members of the Commission weighs slightly in favor of Commission immunity from suit. *Cf. Peters*, 16 F.3d at 1351-52 (where separately incorporated agency was found to have power to enter contracts, hold property, and set and collect tolls, we held that the autonomy factor weighed "slightly" in favor of affording immunity in light of the states' power to appoint the members of the board of the agency in question).

D. *The Totality of Factors*

Having considered each of the three factors above, we now must consider the three factors in their totality. *See*

Bolden, 953 F.2d at 821. Since the most important factor, funding, weighs heavily against the Commission and only one factor weighs, even slightly, in favor of the Commission, the balance is clearly struck against a finding that the Commission enjoys sovereign immunity as an arm of the Commonwealth of Pennsylvania. Consequently, we find that the Commission is subject to suit in federal court. We will affirm the district court's conclusion to this effect.

IV. *Conclusion*

For the reasons stated above, we will affirm the district court's denial of the defendants' motions for summary judgment on Eleventh Amendment and qualified immunity grounds.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit